

1 **IN THE UNITED STATES DISTRICT COURT**
2 **SOUTHERN DISTRICT OF WEST VIRGINIA**
3 **AT HUNTINGTON**

4

IN RE: : **MDL NO.**
5 **ETHICON INC.,** : **2:12-MD-02327**
6 **PELVIC REPAIR SYSTEM** :
7 **PRODUCTS LIABILITY LITIGATION** :
8 :
9 :
10

11 **TELEPHONIC HEARING**

12 **BEFORE THE HONORABLE**
13 **CHERYL A. EIFERT**
14 **UNITED STATES MAGISTRATE JUDGE**

15 **THURSDAY FEBRUARY 6, 2014**

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1 P R O C E E D I N G S

2 THE CLERK: Hello, this is Laura, Judge Eifert's
3 assistant. Could I ask who is on the line for plaintiffs,
4 please?

5 MR. FREESE: Yes. Richard Freeze.

6 THE CLERK: Would you mind to spell your name?

7 MS. BAGGETT: Renee Baggett.

8 THE CLERK: I'm sorry Renee, just one moment.

9 MR. FREESE: Yes, ma'am, it's F-R-E-E-S-E.

10 THE CLERK: Okay. Renee Baggett.

11 MS. BAGGETT: Yes. Renee Baggett.

12 THE CLERK: Thank you very much. Okay, who else
13 is on the line, please, for plaintiffs?

14 Let's move on to defendants, please, who's on the
15 line?

16 MR. GAGE: William Gage.

17 THE CLERK: All right. Thank you.

18 MR. AYLSTOCK: Hello, this is Bryan Aylstock.

19 MR. BERNARDO: I'm not sure if I got cut off.

20 It's Rich Bernardo.

21 THE CLERK: Could you spell your last name, Rich,
22 please?

23 MR. BERNARDO: Sure. B-E-R-N-A-R-D-O.

24 THE CLERK: Thank you very much. Do we have
25 anyone else on the line?

1 MS. MODAK-TRURAN: Anita Modak-Truran.

2 M-O-D-A-K-T-R-U-R-A-N.

3 THE CLERK: Thank you.

4 MS. JONES: And finally, Your Honor, this is
5 Christy Jones. Christy D. Jones or Christy Jones.

6 THE CLERK: I'm sorry, did you say Christy Jones?

7 MS. JONES: Right.

8 THE CLERK: Okay, thank you. No, I did not get
9 you, so thank you. All right. Is that everyone? Seems to
10 be. Thank you. Hold one moment for Judge Eifert, please.

11 THE COURT: All right. Laura has given me the
12 names of the people on the line, so I won't have you repeat
13 that at this time. I will ask that you identify yourself
14 before you speak so we can have a clean transcript.

15 Who would like to go first?

16 MR. AYLSTOCK: Good morning, Your Honor, this is
17 Bryan Aylstock. I'm going to have Rich Freese address the
18 issue.

19 THE COURT: All right.

20 MR. FREESE: Good morning, Your Honor, this is
21 Rich Freese. How are you doing?

22 THE COURT: Fine. How are you?

23 MR. FREESE: Thank you, good. Your Honor, the
24 reason for the call is that the plaintiffs would like to
25 take a two-hour deposition of James Mittenthal. You may

1 remember him. He was the corporate representative that
2 Ethicon put up in response to the spoliation issues in this
3 case. He was deposed in the MDL on May 14th and on August
4 13 of 2013. Obviously at the time of that deposition, it
5 was taken as a discovery deposition, we did not have the
6 benefit of Your Honor's ruling, which you issued on February
7 4th, just a couple days ago, and we now have a roadmap to
8 what Your Honor has found. And one of the things that Your
9 Honor stated that it would be your recommendation to Judge
10 Goodwin that the plaintiffs be permitted on a case-by-case
11 basis to attempt to establish willfulness and
12 deliberateness. And Your Honor found that they were
13 negligently destroying documents, but it didn't rise to the
14 level of -- (recording inaudible) -- willful, which would
15 then allow you to enter more serious sanctions.

16 It's our belief because the deposition was taken before
17 we had this guidance, that -- and because it was a discovery
18 deposition, it's obviously choppy, it's all over the place,
19 because we were trying to cover the waterfront on thousands
20 of employees and dozens of records custodians whose files
21 were admittedly destroyed.

22 What we now would like to have Your Honor do is allow
23 us simply two hours to go take a trial testimony deposition
24 of Mr. Mittenthal so we can get it straight and present it
25 to a jury in a cohesive fashion that it's not in existence

1 right now in the two prior depositions.

2 I would add, Your Honor, that we had asked Judge
3 Goodwin at the pre-trial conference to allow us to remotely
4 allow us to compel three or four Ethicon witnesses to appear
5 at a federal court in another district and give live
6 testimony. Judge Goodwin denied that motion. But he said
7 as an accommodation, he would give us two-hour depositions
8 for each one of those witnesses. For those reasons, we have
9 decided to forego those depositions, even though Ethicon
10 would have preferred to have put the witnesses on. We are
11 simply now asking to do the same thing with Mr. Mittenthal
12 that we would have had the chance to do for others.

13 I would also tell the Court that I anticipate that they
14 may claim some lateness and prejudice, but Ethicon was given
15 six weeks to respond to the motion of spoliation. And so
16 Your Honor didn't have the benefit of having a hearing until
17 almost -- at trial. So the timing is important. We
18 couldn't have asked earlier than this. So we're coming to
19 you as soon as is reasonably possible now that we have Your
20 Honor's ruling and said it would be two hours and two hours
21 only, and it would be strictly for trial purposes, to
22 attempt to prove what we believe we can prove, which is
23 the willful and deliberate destruction of documents that we
24 believe that prejudice our client.

25 Thank you, Your Honor.

1 MR. AYLSTOCK: Judge, if I may, Your Honor, this
2 is Bryan Aylstock. Could I have one point?

3 THE COURT: Yes.

4 MR. AYLSTOCK: The -- just going back to the issue
5 of the timing of this. Had we had the benefit of Your
6 Honor's ruling or even simply the Actos ruling, which would
7 have took us some time to digest, having a 75-page opinion,
8 and we now know that in the Actos case, which is going right
9 now, that in fact the first live witness called was the
10 general counsel in general counsel's office for Takeda to
11 kind of establish the spoliation right out of the gate. We
12 would have certainly added that -- Mr. Mittenthal to our
13 list of either live via video transmission or added to our
14 list. And based upon Judge Goodwin's ruling, my belief is
15 that he would have allowed us to have him, have it as one of
16 those witnesses where we could have a two-hour deposition.

17 When we were taking the deposition, obviously we were
18 just trying to learn stuff. It was truly a discovery
19 deposition where we're trying to get to the bottom of
20 things. It was not a trial prep at all. And so we're
21 asking for this one accommodation in this one instance for
22 Mr. Mittenthal to give a two-hour deposition so that we can
23 present it to the jury which we believe the jury should have
24 the benefit of the information. And now I'll shut up.

25 THE COURT: All right. Who would like to speak on

1 behalf of Ethicon?

2 MR. BERNARDO: This is Rich Bernardo, Your Honor.

3 And I would like to address it, if I may. First, we're
4 troubled by hearing for the first time today that they're
5 looking to take this deposition to reopen the issue as to
6 whether there was willfulness or not. That issue was
7 addressed extensively in the briefing, and it was addressed
8 extensively in not two depositions of Mr. Mittenthal, but
9 three depositions devoted specifically to spoliation.

10 The issue is that we asked plaintiffs to provide us a
11 basis for why they wanted this deposition, and we have not
12 heard anything yet in response. This is the first time that
13 we're hearing that they're looking to reopen the deposition
14 to reopen an issue that we believe Your Honor already ruled
15 upon and found.

16 Now, Your Honor, did leave the door open for some
17 spoliation issue may be in a particular case, but certainly
18 Lewis is not this particular case. Your Honor talked about
19 possibly an occasion which failure-to-warn was an issue, and
20 that's no longer an issue here. Your Honor points out a
21 circumstance in which possibly a sales rep's materials were
22 destroyed. That's not an issue here. I don't know if Your
23 Honor recalls, but we pointed out in our brief, that the
24 sales rep here, Mr. Coiton (phonetic), in fact, produced
25 many more documents than plaintiffs had claimed in their

1 brief. He produced over 2,000 pages of documents, including
2 documents that reflected communications with Dr. Boreham,
3 the surgeon here.

4 So there's clearly no basis to reopen it to discuss
5 anything about Mr. Coiton. All of this information was
6 known to them prior to the deposition of Mr. Mittenthal.

7 Now again, Mr. Mittenthal was deposed extensively, and
8 I believe Your Honor's read at least some of his testimony.
9 And there was a deposition taken specifically devoted to
10 spoliation that we encouraged as a means of trying to get to
11 the bottom of the spoliation issue. One was in May, then we
12 let several months pass -- (recording inaudible) -- another
13 one was in August, and then we went to them and said, tell
14 us who in particular you would like to have Mr. Mittenthal
15 investigate. Mr. Freese mentioned thousands of employees.
16 That's not accurate. There are -- as you know there were 22
17 at issue in this motion, and the plaintiff identified even a
18 smaller subset of that for Mr. Mittenthal to investigate.

19 So they chose not to ask anything about Mr. Coiton or
20 anything that might be relevant. In fact, Your Honor, they
21 chose not to depose Mr. Coiton, or ask him anything
22 pertaining to the -- this case. They deposed him in another
23 case. I think his testimony actually establishes that --
24 (recording inaudible) --

25 So the only basis that we believe Your Honor's opinion

1 left open for possibly dealing with spoliation testimony
2 would be not applicable under the circumstances I described.

3 Now, in addition to the fact that Mr. Mittenthal was
4 deposed for three days, I don't think it's fair just to say
5 that plaintiffs were trying to get their arms around the
6 question of -- as I said, these were for three days
7 separated by many months, and if you look at the transcript,
8 plaintiffs asked questions ranging from A to Z. They
9 literally walked Mr. Mittenthal through every single hold
10 notice, asking him to read testimony -- I'm sorry, asked him
11 to restate the hold notice, and these depositions were
12 clearly designed to be used to be read at the trial.

13 And, in fact, Your Honor, I did an examination of Mr.
14 Mittenthal at the deposition which showed that it wasn't
15 just a discovery deposition, and plaintiff chose to ask no
16 follow-up questions or ask after that deposition for a
17 further one. They had an opportunity to direct. They asked
18 for sound byte. They designated at least 25 portions of
19 that testimony. So there's clearly -- if spoliation even
20 were an issue in the Lewis case, which it is not, and we're
21 going to submit papers to Judge Goodwin on that issue,
22 certainly, there's no need to depose Mr. Mittenthal again
23 for that.

24 And as to prejudice, which Mr. Freese raised. I will
25 raise that Mr. Mittenthal's last deposition was in

1 September, yet plaintiffs waited for several months, and it
2 wasn't until the eve of Thanksgiving that they put in their
3 papers on spoliation. So the fact that we took some time
4 because of the holidays to be able to put in what was
5 obviously a detailed and lengthy submission did not
6 prejudice them.

7 What prejudiced them, if anything, was their sitting on
8 this issue for several months before they even decided to
9 make a motion. So I think to come in at the last minute
10 before trial and ask for additional time is prejudicial, and
11 I'll also say that prejudicial to Mr. Mittenthal, who, as
12 you know, is not a company employee and spends hundreds of
13 hours preparing to get up to speed on these issues, which he
14 did many, many months ago and to now have him -- I wouldn't
15 say cold, but not in the depth of that level of preparation
16 that he was for deposition come and provide trial testimony
17 is unfairly prejudicial to the defendant.

18 THE COURT: Well --

19 MR. FREESE: Your Honor, if I could?

20 THE COURT: Let me just give you my thoughts.

21 My understanding, Mr. Freese, of what you want to do is
22 take an evidentiary deposition based upon his prior
23 testimony, not to actually ask questions that haven't been
24 asked before. Is that correct?

25 MR. FREESE: Well, I think I would say, Your

1 Honor, yes, we would like to still be -- the information
2 from prior depositions, a format that can be easily
3 converted into a trial evidentiary deposition. And let me
4 just point out the deponents who Judge Goodwin gave us that
5 right to do, many had been deposed longer than Mr.
6 Mittenthal. And yet he said, yes, I understand you can have
7 two hours to get your trial testimony, and that is what we
8 would -- that's what we would propose to do here.

9 And, yes, the short answer to your question is yes, and
10 still what we have and what we think we would have now and
11 then I'll put it in a format for presentation at this trial.

12 MR. AYLSTOCK: Judge, there's one other important
13 point, Your Honor -- this is Bryan Aylstock.

14 THE COURT: Before you go on, Mr. Aylstock, let me
15 just follow through with this thought, if you don't mind.

16 MR. AYLSTOCK: Sure.

17 THE COURT: If there was evidence in these
18 depositions of deliberateness, willfulness, bad faith, why
19 was that not supplied to me as part of the motion? Because
20 I didn't see that.

21 MR. FREESE: Well, Your Honor, I mean, for
22 example, on the footnote on your order, I believe it's on
23 Page 8, there's some confusion whether or not the 2003 hold
24 which Your Honor found that that was, in fact, related to
25 the TTV litigation, that might influence your decision

1 differently. However, Your Honor found that it wasn't clear
2 whether or not the 2003 hold in which they admit was always
3 the 2003 forward was, in fact, related to TVT. We intend on
4 examining that. The case based on how Your Honor --

5 THE COURT: I'm sorry. Maybe I wasn't clear.

6 Maybe I wasn't clear in my order. But I knew that it was
7 related to a TVT device. And I knew that Mr. Mittenthal
8 said that it had not ever been officially withdrawn. I knew
9 that. I just did not believe that that put Ethicon on
10 notice of all the lawsuits that were to come, particularly
11 the ones that were starting to be filed in 2009 and 2010.
12 So -- but that's kind of a side point.

13 You know, the other aspect of my order, the other area
14 that I struggled with, and I explained this at the hearing,
15 was this whole issue of prejudice. Because I just didn't
16 see anything suggesting to me that there were gaps in your
17 case or missing evidence.

18 And I don't know, would Mr. Mittenthal be able to help
19 with that aspect of it?

20 MR. FREESE: Well, I think he is our best and last
21 hope. But we now have Your Honor's ruling. We felt we had
22 shown requisite intent and willfulness. Your Honor didn't
23 agree. You set it out in your order. And now that we have
24 it, we know who the witness is, then we try to go get that
25 in a coherent trial ready fashion in an attempt to prove it

1 and ask if you'll allow us to put it in evidence.

2 THE COURT: Okay. Mr. Aylstock, what were you
3 going to add?

4 MR. AYLSOCK: Well, the only other point I was
5 going to add, there were several depositions of Mr.
6 Mittenthal. Of course, now a lot of this information about
7 the custodial files that were missing came certainly after
8 his first deposition. And then when we went to take his
9 deposition, we asked for, look, if you're going to be a
10 designee that doesn't have any personal knowledge, we want
11 the notes, and we requested the notes and duces tecum so
12 that we can, you know, make this a productive deposition.
13 What ended up happening is the notes weren't produced. We
14 had a discussion about it. And they said, well, we'll give
15 you the notes, why don't we stop the deposition, and we'll
16 have another deposition after the notes.

17 So the idea that he's really been examined for three
18 days on this isn't right. Because we needed the notes, and
19 we were just trying to get to the bottom of, okay, which
20 files, where. It's not in a coherent way, Your Honor, and
21 that -- I just believe that a two-hour deposition would
22 clear up a lot of the issues and make it understandable for
23 either Judge Goodwin to rule on it at trial or for the jury
24 to hear. And the idea that we waited until the Thanksgiving
25 -- we were trying to figure out, and, frankly, get more

1 testimony from the actual witnesses themselves about what
2 they knew, when they knew about the hold notice and things
3 like that. So we didn't tarry. And they had six weeks to
4 respond. If they had had two weeks, like, or like the rules
5 require, like we had to do for the Daubert briefs and
6 Summary Judgment and everything, then we would have had Your
7 Honor's ruling and we would have put Mr. Mittenthal on our
8 request and we wouldn't be here today.

THE COURT: Okay.

10 MR. BERNARDO: Your Honor, may I make one
11 additional comment?

12 THE COURT: Yes.

22 Given Your Honor's ruling, I don't understand why the
23 testimony would even be relevant here in this particular
24 case. Again, we're not talking about something that Your
25 Honor clearly acknowledged in a footnote to Your Honor's

1 order about the possibility of a sales rep who is
2 particularly at issue in a case of failure-to-warn. That's
3 not what we're talking about here. Because as I described
4 before, that can't be the issue.

5 So what we're doing is we're reopening the whole
6 general issue of spoliation. And I think that even more
7 significantly prejudices Ethicon for trying to put up Mr.
8 Mittenthal on no notice to, I'll say, jam this issue in in
9 the several days that we have before the trial of this
10 issue.

11 So I would really ask that if there is another round of
12 this -- and I think Your Honor left that door open -- if
13 there's another round of this and if there's a need for
14 another deposition of Mr. Mittenthal at some point in time
15 to achieve a broader purpose, then we ought to be discussing
16 that. But for -- given where we are at the start of the
17 trial, this ought to be a showing that they're missing
18 something that they don't have to go to trial and that they
19 need the testimony in order to put on a case for trial.

20 And we respectfully say that's not present here .

21 MR. FREESE: Your Honor, if I could respond to
22 that very quickly? This is Richard Freese. Two points.

23 We didn't have the ability to fully respond, and I'll
24 give you a concrete example. At the hearing -- and I was at
25 the hearing when Mr. Gage made the argument we had the

1 benefit of every, you know, oral argument, which we didn't
2 have at the time of our briefing, and particularly at the
3 time when we took Mr. Mittenthal's deposition, you'll
4 recall, Your Honor, that they argued with -- (recording
5 inaudible)-- and Mr. Gage argued at the hearing, that you
6 know what, there are just people that just did not
7 understand what their obligations were when these litigation
8 hold orders were issued. Okay. And Mr. Mittenthal
9 testified about that.

10 What they didn't bring to Your Honor and what still was
11 not disclosed to us is who are these people. They had Mr.
12 Mittenthal. They had affidavits. Where are the people that
13 didn't understand what their obligations were? The person
14 who destroyed the president Renee Salman's hard drive. Who
15 is that? It certainly wasn't Mr. Mittenthal. Why didn't
16 they put up the person, and these are the things that we
17 now --

18 (Audio recording stopped. No audio.)

19 THE COURT: Hello. Hello. Is everyone there?

20 MR. FREESE: I'm sorry. I was going --

21 THE COURT: Yes, Mr. Freese, I'm sorry. For some
22 reason our speaker system, our whole audio system went out
23 while you were speaking.

24 MR. FREESE: Oh, gosh. Okay. I made such a good
25 point, too, Your honor.

1 UNIDENTIFIED SPEAKER: It was the most impressive
2 argument I've ever heard out of Mr. Freese, but --

3 THE COURT: All right, I think -- the last.

4 MR. FREESE: Your Honor, if I can repeat. If you
5 can hear me now.

6 THE COURT: Just everyone stop a second. Because
7 we've got to make sure we have got a decent transcript. And
8 she's not going to be able to get any of this down if we're
9 all talking.

10 Mr. Freese, the last point I heard you make was that at
11 the time that you took Mr. Mittenthal's deposition, you did
12 not know that he was going to say that certain people didn't
13 understand the directions, and now you don't have the names
14 of any of these people. And that's the last I remember you
15 saying.

16 MR. FREESE: Yes. My point, that was one of my
17 chief points, which was that -- Rich was saying that -- Rich
18 for Ethicon, I'm sorry, was saying that we basically had all
19 this information when we took the depositions. And my point
20 was that we did not. And one concrete example of that is
21 that not only in the papers which we didn't have at the
22 deposition of their response to the motion, but also Mr.
23 Gage's argument, they made a particular point to continue at
24 the hearing, well, the people that destroyed or deleted or
25 allowed these documents to be destroyed didn't understand

1 the obligations of a litigation hold letter.

2 They don't say who they are, when they knew it, why
3 they didn't know it. They gave us Mr. Mittenthal, who
4 didn't know these people. And these are the sorts of
5 questions that we want to ask now, because we think as we
6 drill deeper and we now have that information from Ethicon
7 which we didn't have -- we've now seen them take a position
8 that there's some universe of people out there that just
9 simply didn't understand what their obligation was.

10 So we want to --

11 (Recording inaudible.)

12 (Interruption.)

13 MR. FREESE: I wasn't finished, counsel. And I'm
14 sorry, my second point was -- before I got cut off is, they
15 were saying that this is, you know, in Ms. Lewis' case, you
16 know, Ms. Lewis' case, I simply wanted to remind everybody
17 that Ms. Lewis' case is a bellwether case. So it has
18 implications beyond her case. We think this is an important
19 issue. It's an important issue. And so it's not just Ms.
20 Lewis' case at stake here, it's a bellwether case that
21 affects thousands and thousands of Ethicon lawsuits that are
22 pending before Your Honor.

23 So we can't look at it in a vacuum and say, well, it's
24 only a Ms. Lewis specific issue. It does have specific
25 implications for her case, but it also has implications for

1 all the Bellwethers before Your Honor.

2 UNIDENTIFIED SPEAKER: Your Honor, to correct one
3 thing that Mr. Freese said. The fact that there isn't a --
4 and I'm using a word that Mr. Mittenthal used, if I remember
5 his word, understanding from some of the company is not
6 something that was raised by Mr. Gage the first time the
7 argument -- first of all, I believe it was in Mr.
8 Mittenthal's declaration, but, more importantly, that is
9 stated early on, because that was one of the issues. And
10 plaintiffs had the opportunity to and did in fact explore
11 that.

12 So none of what we're discussing here is new. None of
13 this is stuff that could not have been explored. This is
14 really a last effort to -- on a very short timeframe,
15 basically, to start all over again. And we urge the motion
16 for spoliation that Your Honor so thoughtfully opined on and
17 gave us some guidance on.

18 THE COURT: All right. When Judge Goodwin ruled
19 that you could take some evidentiary depositions, how many
20 did he say you could take?

21 MR. FREESE: I believe it was four, Your Honor.

22 THE COURT: Four, all right. Well, here's what
23 I'm going to do. I'm going to allow the plaintiffs to take
24 a two-hour deposition of Mr. Mittenthal. However, it is not
25 a deposition to be taken for discovery purposes, which means

1 that if you've already covered this ground and you just
2 failed to ask certain questions -- and I do specifically
3 recall reading testimony by Mr. Mittenthal where he said
4 that some people didn't understand what their obligations
5 were, so that was already stated in the testimony. And I
6 don't think the deposition ought to be an opportunity for
7 you now to go ask questions you did not ask the first time.

8 It would be an opportunity for you to reformat the
9 testimony in a way that makes it easier for the jury to
10 understand, but not to actually go plow new ground.

11 MR. FREESE: Your Honor, I understand.

12 THE COURT: Having said that, I think the
13 plaintiffs should be able to take this. This is an
14 important point to their case.

15 I still want to point out that, you know, one of the
16 big problems I had with the spoliation motion, I mean
17 obviously documents were destroyed that were probably --
18 some of them probably relevant to your case under the
19 definition of relevance for spoliation. But, you know, I
20 still didn't see the prejudice. I didn't see the smoking
21 gun like you had in Actos. I didn't see anything there that
22 made me think that you're missing something really crucial
23 to your case, which is what you almost need to have to get
24 an adverse inference instruction. And I just didn't see
25 that.

1 Most of the cases say no matter how deliberate the
2 destruction was, if the result is that there's not that much
3 prejudice, you're still not going to get an extreme sanction
4 like an adverse inference instruction.

5 So I just want to make that point so you understand
6 that it's not all about whether they did this on purpose or
7 not. I didn't see anything that made me believe that
8 somebody intentionally destroyed evidence knowing that it
9 was evidence.

10 It sounded to me like the company just wasn't very good
11 at managing the litigation holds and knowing what they were
12 supposed to do. Which is why I said I felt they were
13 negligent or grossly negligent, but I didn't find it to be
14 willful. But that's just one-half of the equation.

15 So, having said that, I'm going to let you take your
16 deposition, with the caveats that I've made. And of course
17 you need to do it quickly, because your trial starts on
18 Monday, doesn't it?

19 MR. FREESE: Yes, Your Honor.

20 MR. BERNARDO: Yes, Your Honor.

21 THE COURT: And I know that that causes some
22 difficulties for Ethicon, but you have to remember we
23 wouldn't be in this position in the first place if people
24 hadn't destroyed some of the documents and wiped hard drives
25 clean and whatnot.

1 UNIDENTIFIED SPEAKER: Your Honor, we would ask,
2 understanding that the trial begins Monday, that this
3 deposition doesn't necessarily have to be taken before the
4 commencement of the trial, and we'd also like to take the
5 opportunity to make a motion in front of Judge Goodwin to
6 address this issue which perhaps may moot this. We would
7 ask that the deposition happen sometime later next week so
8 that, A., we have an opportunity to raise this with Judge
9 Goodwin, and B., have the opportunity to prepare Mr.
10 Mittenthal.

11 MR. AYLSTOCK: Your Honor, this is Bryan Aylstock.
12 In the Actos trial, the very first witness was, in fact, a
13 spoliation issue. And obviously Judge Goodwin is going to
14 need to weigh in on this, but if we don't have this done and
15 done prior to trial, then, especially given the timing and
16 the schedule that Judge Goodwin has made clear we must meet,
17 it's going to be very problematic. So we're available as
18 soon as tomorrow or Saturday, Sunday, and we'll make
19 ourselves available. We would like it done certainly before
20 the trial. Or maybe we could do it Monday morning during
21 the jury selection, some of us can peel off and do it then.

22 MS. JONES: Your Honor?

23 THE COURT: Yes.

24 MS. JONES: I apologize. This is Christy Jones.
25 And I understand that I'm -- (recording inaudible) -- I just

1 want to say that after the 4th that when Judge Goodwin --
2 every deposition that the plaintiffs -- (recording
3 inaudible) -- specifically -- (recording inaudible) -- put
4 the requirements around that.

5 The other piece was that the entire deposition must not
6 take more than two hours, and that included an opportunity
7 for the defendant to conduct a Direct Examination. This
8 would be a trial -- (recording inaudible).

9 I assume that Your Honor intends for the same rules to
10 apply?

11 THE COURT: Yes, I do. Because, as you all know,
12 I believe it was in this case, I wasn't a fan of doing the
13 evidentiary deposition, because there was really nothing set
14 out in any of the docket control orders that allowed for
15 that. And I was worried that it would -- you know, there
16 would be no fair way to do it.

17 So I think whatever Judge Goodwin has told you are the
18 parameters of these evidentiary depositions, you need to
19 abide by those parameters. So if he said it is two hours
20 total, plaintiff and defendant, then that's the way it has
21 to be.

22 Are you all still there?

23 MR. FREESE: Yes, we're still here.

24 UNIDENTIFIED SPEAKER: We agree to abide by
25 obviously whatever Judge Goodwin ruled in the other

1 depositions.

2 THE COURT: Yes. So whatever --

3 UNIDENTIFIED SPEAKER: I have to go back and look
4 at the transcript.

5 THE COURT: -- whatever the parameters were that
6 he put on the deposition, then that's what you need to abide
7 by. And as far as the timing of the deposition, I think
8 you're going to need to try to work that out. But you can't
9 wait too long if you want to use it in Lewis. I do agree
10 that the timing has been a real problem here. The motion
11 was filed in such a way that, you know, even giving the
12 defendants a little bit of extra time to respond, it was
13 still pretty cramped.

14 And then the day that I was ready to finish my opinion,
15 I got a 75-page opinion from another judge that I had to,
16 you know, in all fairness, review and analyze and see how
17 that affected my decision-making. So as an end result it
18 took me longer to get the order out than I had originally
19 anticipated. And of course everyday I was getting a nice
20 letter from one of the other of you, with your thoughts on
21 that decision. And so -- (recording inaudible).

22 And I wanted to take time to really digest what you
23 were saying, because I realize this is a very important
24 issue for both sides.

25 So it's unfortunate that this timing is the way it is,

1 but for this deposition to be used in Lewis, then it's going
2 to have to be taken in the next few days. I'm sure Judge
3 Goodwin and I'm sure the parties don't want to be taking a
4 deposition on the end of the first week of trial. I mean,
5 you can if you want to.

6 MR. FREESE: We have to rest in four and a half
7 days, Your Honor, so --

8 THE COURT: Well, there you go.

9 MR. FREESE: Yeah. So it needs to be at the
10 beginning of the week.

11 THE COURT: All right. Well, why don't you try to
12 pick a day, and try to give Ethicon as much time as possible
13 so that they can prepare their witness, because that is also
14 only fair.

15 MR. FREESE: Yes, Your Honor. I'll call right
16 after this call, Your Honor.

17 THE COURT: All right. Is there anything further?

18 UNIDENTIFIED SPEAKER: No, Your Honor. Thank you
19 for your time.

20 UNIDENTIFIED SPEAKER: No, Your Honor.

21 THE COURT: Thank you.

22 (Proceedings were concluded.)

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1 REPORTER'S CERTIFICATE

2 I, Catherine L. Schutte-Stant, an Official Court
3 Reporter of the United States District Court, for the
4 Southern District of West Virginia, do hereby certify that
5 the foregoing proceedings, which were taken out of my
6 presence, were transcribed by me from an audio-recording to
7 the best of my ability, and said proceedings are a true and
8 accurate transcript from my stenographic notes. I further
9 certify that I am neither related to any of the parties by
10 blood or marriage, nor do I have any interest in the outcome
11 of the above matter.

12 FEBRUARY 7, 2014 s/CATHERINE L. SCHUTTE-STANT, RPR, RMR
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